IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

APPEAL FROM ORDER No 366 of 1999
with
CIVIL APPLICATION No 7619 of 1999

For Approval and Signature:

Hon'ble MR.JUSTICE SHARAD D.DAVE

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

MAHENDRABHAI JETHALAL VYAS

Versus

HEIRS & L.R. OF RAJENDRASINH MASASINH SHOKHI

Appearance:
1. Appeal from Order No. 366 of 1999
HL PATEL ADVOCATES for Petitioner No. 1
MR MIHIR H JOSHI for Respondents No. 1,1/C
MS HEMANI S BHATT for Respondents No. 1-1/A
RULE SERVED for Respondents No. 1/B,1/D-2
MR AJAY R MEHTA for Respondent No. 3

CORAM : MR.JUSTICE SHARAD D.DAVE

Date of decision: 24/12/2001

C.A.V. JUDGEMENT

This appeal from order is preferred against the order dated 15.7.99 passed by 5th Jt.Civil Judge (S.D.) on the application under Order 38 Rule 5 & 6 of the Civil Procedure Code, 1908.

The brief facts of the appellant's case are as under :

The appellant is doing the business of construction. O.N.G.C.Ankleshwar gave a contract for constructing roads to one Rajendrasinh Masasinh Sokhi who in turn gave sub-contract to the plaintiff for the said work. That Rs.7,15,762/- are payable by Rajendrasinh to the appellant for the said work. Another Rs.7,05,000/are also payable to the appellant by Rajendrasinh which were paid by the appellant on behalf of Rajendrasinh to Speedking Enterprise. Rajendrasinh gave two post cheques dated 10/10/98 and 2/11/98 of Rs.9,00,000/- and Rs.8,65,000/- respectively. Rajendrasinh died on 9/9/98. The appellant could not recover the said dues. The heirs of the deceased Rajendrasinh, the respondents no. 1 to 4, are now liable to pay the money to the appellant and therefore the Special Civil Suit No. 229/98 was filed for recovery of Rs.17,65,000/-, but they are trying to sell off their property in Bharuch and shift to Punjab. At this position, the appellant gave an application under Order 38 Rule 5 & 6 for attachment before judgment which was dismissed after hearing the defendants.

It is submitted by Mr.Pandya L.A. for the appellant that the learned trial court has erred in not taking into consideration the seriousness of the fact that the respondents are hailing from Punjab and they are trying to sell off their properties and shift permanently to Punjab and if this takes place, the appellant will not get a single rupee from the respondents. The learned advocate relied on the case of Sardar Govindrao Mahadik and another V/s Devi Sahai and others reported in AIR 1982 S.C. 989 and submitted that the sole object behind the order levying attachment before judgment is to give an assurance to the plaintiff that his decree if made would be satisfied. Therefore, the application under Order 38 Rule 5 & 6 should be granted by allowing this appeal in order to make the dues of the appellant secure.

Against these submissions, L.A.Mr. Mihir Joshi for the respondents submitted that mere bare assumption that as the respondents belong to Punjab, they will sell their property and shift to Punjab should not be the basis for granting the application under Order 38 Rule 5 & 6 of the Civil Procedure Code. He has relied on the

decision in case of Bharat Tobacco Co. V/s Maula Saheb A Jamadar & Ors. reported in 1981 G.L.R. 343 and submitted that the Court before passing order for attachment before judgment must be satisfied that the defendant is about to dispose of whole or part of the property with a view to defeat the decree. Therefore, this appeal from order should be dismissed with cost.

Heard the learned advocates. Order 38 Rule 5 reads as under :

" 5. Where defendant may be called upon to furnish security for production of property :-

(1) Where at any stage of a suit, the Court is satisfied, by affidavit or otherwise, that the defendant, with intent to obstruct or delay the execution of any decree that may be passed against him,- (a) is about to dispose of the whole or any part of his property, or (b) is about to remove the whole or any part of his property from the local limits of the jurisdiction of the Court....."

In this case, there is no proof to show that the respondents are about to sell off their property. Only a sentence stated by the deceased respondent before 1 1/2 months of his death to Jagat Bhanuprasad Shastri, a broker, whose affidavit is produced at exh. 31, that he wants to wind up his property and settle at Punjab cannot be said to be a solid base for passing order of attachment before judgment. The trial Court rightly came to the conclusion that mere allegation does not make any base and that there is no material on record to show that the respondents are going to Punjab and trying to avoid the dues of the appellant. I fully agree with this finding and as there is no merit in this appeal from order, this appeal from order requires to be dismissed.

Accordingly, appeal from order is dismissed. C.A. is also dismissed. I/R, if any, granted earlier stands vacated.

(SHARAD D DAVE, J)

srilatha

Ms.Jyotsnaben Patel L.A. for Mr.A.Pandya L.A. for the appellant requests that as the A.O. & C.A. are dismissed, stay may be granted for 8 weeks as she wants to go to the higher forum. I am of the opinion that 4 weeks time is sufficient. Therefore, this order is stayed till 24.1.02.

(SHARAD D DAVE, J)